

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CAROL DAVISON,)	3:05-CV-0021-BES (RAM)
)	
Plaintiff,)	
)	<u>ORDER</u>
vs.)	
)	
ELDORADO RESORTS LLC, et al.,)	
)	
Defendants.)	
)	

Before the court is Defendant Eldorado Resorts LLC (hereinafter “Eldorado”) Supplemental Motion for Evidentiary Ruling (Doc. #35), and the Supplement thereto (Doc. #41). Plaintiff filed an opposition (Doc. #45), and Defendant Eldorado replied (Doc. #52). Defendant Coresource, Inc. (hereinafter “Coresource”) filed a motion to join Eldorado’s motion. (Doc. #54.)

STATEMENT OF FACTS

Plaintiff Carol Davison filed an ERISA complaint on January 12, 2005 against Defendants Eldorado and Coresource pursuant to 29 U.S.C. § 1001, et seq. (Doc. #2.) Plaintiff was employed at the Eldorado and received group medical insurance that was an ERISA plan. (*Id.*) The plan was administered by Coresource, a third-party administrator. (*Id.*) The case arises out of Plaintiff’s alleged “emergency” medical stay at Washoe Medical Center in September 2002 as a result of premature labor. (*Id.*) Plaintiff incurred many costs through a series of hospital visits, and she alleges that Defendants failed to provide her with the medical coverage in her group plan. (*Id.*)

The series of motions presently before the court concerns the admissibility of nine letters authored by Plaintiff. These letters were allegedly written by Plaintiff at different times between November 2002 and February 2003, and according to Plaintiff, evidence her attempts to administratively appeal the denial medical benefits. (Doc. #35, Exh. 4.) Defendants deny ever

1 receiving any of the letters. (Doc. #35, Exhs. 1, 2.) As far as Defendants are concerned, Plaintiff has
2 not exhausted her administrative remedies. (Doc. #35.)

3 Plaintiff produced the letters at issue during discovery as a result of her deposition testimony.
4 They are all unsigned versions that were printed out after the fact from a CD¹ created by Plaintiff. (*Id.*)
5 Because Defendants never received Plaintiff's letters, and because Plaintiff could not produce signed
6 copies of the letters she allegedly sent,² Defendants came to question the authenticity of the letters she
7 purportedly saved to CD. The CD from which these letters were printed was examined by both parties
8 and their experts.

9 A. Plaintiff's Deposition Testimony

10 Plaintiff testified that she typed the purported appeal letters on her home computer. (Doc. #35,
11 Exh. 5 at pp. 82, 133.) Specifically, Plaintiff would type the letter, save it, print it out, then sign and
12 mail them from home. (*Id.* at 86-87, 139.) When asked whether she ever saved the documents to her
13 hard drive, she replied that she saved them all to a CD (*id.* at 82, 134), every time she wrote a letter
14 and on the same day she would write a letter (*id.* at 200). Plaintiff explained that she normally backed
15 things up on a CD because her computer had crashed three times. (*Id.* at 82-83.)

16 B. Defendants' Expert: Paul Mudgett of the Singleton Group

17 Mr. "Paul Mudgett is a security and technology professional with over 12 years of experience
18 in information security, computer forensics, technology integration and project management." (Doc.
19 #35, Exh. 7.) His analysis of Plaintiff's CD was based on the "representation" that "[t]he files in
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21
22 ¹Plaintiff answered in the affirmative when she was asked whether she saved her letters to a floppy disk
(Doc. #35, Exh. 5 at p. 83), but it was later clarified that she meant a CD (*id.* at 134). The CD at issue is a CD-
23 R, as opposed to a CD-RW. (Doc. #35, Exh. 12; *see* Doc. #35, Exh. 13 at p. 7.) The key difference between
24 the two is that files placed onto a CD-R cannot be modified or overwritten. (Doc. #35, Exh. 9 at pp. 55, 63, 105;
25 Doc. #35, Exh. 13 at pp. 17-18.) Files that are placed onto a CD-RW may be overwritten. (Doc. #35, Exh. 9
at p. 55.)

26 ²Signed versions could not be produced because Plaintiff never made xerox copies of the letters before
27 she sent them. (Doc. #35, Exh. 5 at p. 139.)

question were . . . directly saved on a CD rather than saved to a computer hard drive and subsequently copied to CD.”³ (*Id.*; Doc. #35, Exh. 13 at pp. 6, 16-17, 21, 29.)

Mr. Mudgett explained that an operating system such as Windows logs three time stamps when a file is saved. (Doc. #35, Exh. 7.) The first stamp is titled “created” and keeps track of the date and time the file was first saved. (*Id.*) The second stamp, “modified,” shows the last time the file was opened and changed. (*Id.*) Finally, the last stamp, “accessed,” displays the date and time the file was most recently opened regardless of whether any changes were made to the file. (*Id.*) Thus, when a file is saved to a CD, the “created” date will be the same as the “modified” date, and cannot change on a finalized CD. (*Id.*)

According to Plaintiff’s testimony then, that she would save directly to CD the same day she wrote each letter, the “created” dates on the CD should reflect the dates written on each of the letters. However, after examining the word files on the CD, Mr. Mudgett discovered the following:

Bates Label No.	Hard copy date	“Created” time stamp as shown on CD files
P78	December 10, 2002	September 13, 2004 at 8:13:58 pm
P85	December 1, 2002	September 15, 2004 at 1:06:21 pm
P87	November 15, 2002	September 15, 2004 at 1:08:53 pm
P65	February 2, 2003	September 15, 2004 at 1:10:48 pm
P67	February 2, 2003	September 15, 2004 at 1:11:43 pm
P61	February 15, 2003	September 15, 2004 at 1:14:47 pm
P69	January 15, 2003	September 15, 2004 at 1:15:24 pm
P74	December 10, 2002	September 15, 2004 at 1:18:53 pm
P80	December 2, 2002	September 15, 2004 at 1:20:32 pm

(Doc. #35, Exh. 7; Doc. #35, Exh. 13 at pp. 9, 16.)

C. Plaintiff’s Expert: Ira Victor of Privacy Technician, Inc.

³A person cannot save documents directly to a CD through Microsoft Word alone. (Doc. #35, Exh. 13 at p. 22.) One would need another program to accomplish that but it is not clear whether Plaintiff had any such programs installed on her computer. (*Id.* at 51-53; Doc. #35, Exh. 9 at p. 195.)

1 Mr. Ira Victor is a certified information security specialist. (Doc. #35, Exh. 11.) One of his
2 certifications, a G17799 ISO, covers data integrity, forensics, chain of custody, incident handling,
3 malware, and other areas of information security. (*Id.*) His analysis of Plaintiff's CD began with some
4 information that he obtained directly from Plaintiff during a personal interview,⁴ Plaintiff's deposition
5 testimony, and Defendants' expert report. (*Id.*)

6 Mr. Victor's opinion was that the true creation dates of the CD files could not be determined
7 without further information. (Doc. #35, Exh. 11.) This was because, for example, the potential
8 movement of data back and forth between CD and hard drive, inaccurate computer time settings, or
9 malware infections could have changed the "created" or "modified" dates on the CD at issue. (*Id.*; Doc.
10 #35, Exh. 9 at pp. 62-68.) Indeed, Mr. Victor was informed by Plaintiff and her computer rental center
11 that Plaintiff's computer had been reformatted or "wiped out" on several occasions due to malicious
12 code infections.⁵ (Doc. #35, Exhs. 8, 11.) Plaintiff also told Mr. Victor that she backed-up her letters
13 onto a CD after she saved them onto the hard drive, and that she did not save her word documents
14 directly to CD. (Doc. #35, Exh. 11.) In fact, according to Mr. Victor, Plaintiff would not have been
15 able to save directly to CD without saving to her hard drive first unless she had a particular kind of
16 software, which she did not. (*Id.*; accord Doc. #35, Exh. 13 at p. 22.)

17 Plaintiff also informed Mr. Victor that after her computer would get reformatted, she would
18 reload all the information onto the hard drive that she had previously backed-up on CD. (Doc. #35,
19 Exh. 9 at pp. 81-82.) Mr. Victor explained, however, that the process of transferring materials back
20 to the hard drive from a CD would change the "created" date of the document saved onto the hard
21 drive to the date of transfer—it would not share the same "created" date belonging to the document
22 saved to the CD. (*Id.* at 63-64; Doc. #35, Exh. 11 (Fig. 1.1); see Doc. #35, Exh. 13 at p. 27-28.) In
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24 ⁴All questions asked by Mr. Victor were formulated and directed by Mr. Victor to Plaintiff. (Doc. #35,
25 Exh. 11.)

26 ⁵When a computer is reformatted, it is essentially reset to its original factory settings such that all
27 information created by the user and extra programs installed by the user are deleted. (Doc. #35, Exh. 11.)
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1 addition, by re-burning⁶ that newly transferred document onto a second CD, the “created” date would
 2 again change to the date of burning.⁷ (Doc. #35, Exh. 9 at pp. 63-64; Doc. #35, Exh. 11 (Fig. 1.2);
 3 see Doc. #35, Exh. 13 at p. 27-28, 37.)

4 LEGAL STANDARD

5 The proponent of any particular item of evidence bears the burden of showing that the evidence
 6 is what the proponent claims it to be. Fed. R. Evid. 901; *United States v. Blaylock*, 20 F.3d 1458, 1462
 7 (9th Cir. 1994); see Fed. R. Evid. 104(b). The proponent must make a prima facie showing “so that
 8 a reasonable juror could find in favor of authenticity or identification.” *United States v. Workinger*, 90
 9 F.3d 1409, 1415 (9th cir. 1996) (citing and quoting *United States v. Chu Kong Yin*, 935 F.2d 990, 996
 10 (9th Cir. 1991)). The determination of authenticity and admissibility is within the court’s discretion.
 11 *Sec. Farms v. Int’l Bhd. of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999, 1011 (9th Cir.
 12 1997); *United States v. Vasquez*, 858 F.2d 1387, 1392 (9th Cir. 1988). Once admitted, the trier of fact
 13 determines the credibility and probative value of the evidence. *United States v. Workinger*, 90 F.3d 1409,
 14 1415 (9th Cir. 1996); *United States v. Black*, 767 F.2d 1334, 1342 (9th Cir. 1985).

15 DISCUSSION

16 Defendants’ Supplemental Motion for an Evidentiary Ruling seeks a preliminary determination
 17 regarding the admissibility of Plaintiff’s purported appeal letters. (Doc. #35.) It is essentially a motion
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19 ⁶To “burn” a CD is a term used when a person places files onto a CD from some other source.

20 ⁷For example, assume that Plaintiff authored a letter and burned it onto a CD on January 1, 2000. The
 21 “created” date of the document on the CD should say January 1, 2000. However, if the document is thereafter
 22 deleted from the hard drive and then reloaded back from the CD one month later, the “created” date of the
 23 document located on the hard drive would be February 1, 2000. The “created” date of the document saved to
 24 CD would remain January 1, 2000. If one month after that, one were to burn that document on the hard drive
 onto a different CD, the “created” date of the new document on the second CD would be March 1, 2000.

25 Mr. Mudgett’s deposition testimony was essentially the same. He testified that moving a file from a CD
 26 to the hard drive “may change [the created date], but you wouldn’t be able to change that create date on the CD
 27 once the CD has been created.” (Doc. #35, Exh. 13 at p. 27.) However, if one were to reburn the file onto a
 new CD, it would be possible for the create date to have changed. (*Id.* at 28.)

1 *in limine* where Defendants move the court to render Plaintiff's purported appeal letters inadmissible
2 based on the fact that the CD to which all of the letters were saved contains documents that are dated
3 more than 180 days after the appeal deadline. (*Id.*)

4 A. Plaintiff's Expert: Mr. Ira Victor

5 Before the court can reach the main issue of the letters' admissibility, it must deal with the
6 preliminary issue of Mr. Victor's competence to testify as an expert. Courts have broad discretion in
7 determining whether a person qualifies as an expert. *United States v. Johnson*, 575 F.2d 1347, 1360-61
8 (5th Cir. 1978); *Fineberg v. United States*, 393 F.2d 417, 421 (9th Cir. 1968); see Fed. R. Evid. 104.
9 Under Federal Rule of Evidence 702, in order to qualify as an expert one must possess the "knowledge,
10 skill, experience, training, or education' relevant to such evidence or fact in issue." *United States v.*
11 *Chang*, 207 F.3d 1169, 1172 (9th Cir. 2000) (citing Fed. R. Evid. 702). Defendants challenge Mr.
12 Victor's qualification and argue that he is not competent to give an expert opinion because he lacks
13 any real knowledge and experience in forensic investigations. (Doc. #35.)

14 In the court's view, however, Mr. Victor's collective experiences sufficiently demonstrate that
15 there is a reliable basis for his technical knowledge and opinion in this matter. *Kumho Tire Co. v.*
16 *Carmichael*, 526 U.S. 137, 149 (1999). Mr. Victor is a certified information security specialist who
17 currently works for an information security consulting firm. (Doc. #35, Exh. 11.) He has two security
18 certifications (Doc. #35, Exh. 9 at pp. 8-9), and has experience setting up various computer systems
19 for businesses (*id.* at 9), managing data in secure environments (*id.* at 17), and an overall thirteen years
20 of experience in the field of information technology and e-commerce (*id.* at 9). Although forensics may
21 not be his direct focus, his field of work necessarily involves and overlaps with the field of forensics in
22 that there are different stages of security incident management and compliance that require one to
23 evaluate and investigate what may have happened to certain data. (*Id.* at 47.) In fact, "[d]ata
24 movement, transmission, and forensics like the kind under discussion in Ms. Davison's case, are key
25 areas of concern for specialists in the information security field" (Doc. #35, Exh. 11). See *United States*
26 *v. Bourgeois*, 950 F.2d 980, 987 (5th Cir. 1992) (using expert's own testimony in determining his
27 qualifications to give an opinion).

1 Mr. Victor's reluctance to call himself an expert in forensics (Doc. #35, Exh. 9 at pp. 87-88)
2 is inconsequential to the court's determination, see Fed. R. Evid. 104; *Fineberg*, 393 F.2d at 421. It is
3 clear from the course of his deposition that Mr. Victor was unaware of the legal definition of an
4 "expert," and was instead using the layman's definition. (Doc. #35, Exh. 9 at pp. 87-88.) However,
5 the law does not limit expert testimony to those who are considered the absolute best in the field. See
6 *Sidebottom v. Delo*, 46 F.3d 774, 753 (8th Cir. 1995). The law only requires that Mr. Victor possess
7 "such knowledge and experience in [the] field or calling as to make it appear that his opinion or
8 inference will probably aid the trier in his search for the truth[,]" *Fineberg*, 393 F.2d at 421; accord
9 *Jenkins v. United States*, 307 F.2d 637, 643 (D.C. Cir. 1962), and the court finds that he does.

10 Second, Defendants object to Mr. Victor's report based on his reliance on an out of court
11 interview with Plaintiff. (E.g., Doc. #35, Exh. 9 at p. 100.) Of course, experts may rely on inadmissible
12 evidence, including hearsay, in forming their opinions as long as they are of "a type reasonably relied
13 upon by experts in the particular field in forming opinions." Fed. R. Evid. 703; accord *Carson Harbor*
14 *Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 873 (9th Cir. 2001). Whether the inadmissible evidence is
15 of the type reasonably relied upon by other experts is a matter for the court to decide. Fed. R. Evid.
16 104(a); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 748 (3d Cir. 1994). Here, the court finds that
17 Defendants' objection to the use of Mr. Victor's report goes more towards its weight to be given at trial
18 rather than its admissibility.

19 Mr. Victor chose to interview Plaintiff before he made his report because her deposition
20 testimony was too vague for him (Doc. #35, Exh. 9 at p. 70), to form an opinion on the accuracy of
21 the "created" dates on the CD at issue (*id.* at 51). *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 748
22 (stating that judges can rely on the expert's own opinions in determining whether there was reasonable
23 reliance); see *United States v. Sims*, 514 F.2d 147, 149 (9th Cir. 1975) (an "expert is fully capable of
24 judging for himself what is, or is not, a reliable basis for his opinion"). The deposition testimony was
25 not developed or specific enough to give him an "understanding [sic] the circumstances involved in
26 the creation, access, storage, back-up and chain of custody of the files." (Doc. #35, Exh. 11.) For
27 example, throughout Plaintiff's deposition both Plaintiff and counsel made constant references to a
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“disk” not realizing that floppies, CDs, and hard drives are all disks. (Doc. #35, Exh. 9 at pp. 70-71; e.g., Doc. #35, Exh. 5 at pp. 139, 200.) Given the overall vagueness of her testimony and the signs of confusion, the court finds it was reasonable and logical for Mr. Victor to interview Plaintiff and ask her more specific questions before forming an opinion. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 748.

The effect of Mr. Victor’s opinion being based of Plaintiff’s out of court statements should then be for the trier of fact to determine. *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000) (“‘weaknesses in the factual basis of an expert witness’ opinion . . . bear on the weight of the evidence rather than on its admissibility”); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1352 n.5 (9th Cir. 1987).

[T]he opinion ‘is regarded as evidence in its own right and not as hearsay in disguise.’ In a sense, the expert synthesizes the primary source material be it hearsay or not into properly admissible evidence in opinion form. The trier of fact is then capable of judging the credibility of the witness as it would that of anyone else giving expert testimony. This rule respects the functions and abilities of both the expert witness and the trier of fact

Sims, 514 F.2d at 149. Here, Mr. Victor’s opinion necessarily concludes that the CD at issue is not the original if in fact Plaintiff did move documents back and forth between CDs and her hard drive (see Doc. #35, Exh. 11 (Figs. 1.1-1.3)). See *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984) (stating that the hearsay evidence should only be considered to the extent it serves as the foundation for the expert opinion, and not as substantive evidence); *Sims*, 514 F.2d at 149-50 (same). Mr. Mudgett’s report, on the other hand, assumes that the CD is the original back-up. (See Doc. #35, Exh. 7.) Thus, whether Mr. Victor’s or Mr. Mudgett’s opinion is controlling will ultimately rest on Plaintiff’s credibility.

The court will not turn what is essentially a credibility determination on a key issue of fact into question of admissibility. Accordingly, the court finds Mr. Victor is competent to testify as an expert in this matter, and that his testimony is not inadmissible for its reliance on hearsay.

B. Authenticity of the Compact Disk

The substance of Defendants’ Motion is that Plaintiff cannot present sufficient evidence to sustain a preliminary determination of admissibility for the appeal letters. Defendants argue that no reasonable juror could find Plaintiff’s letters are authentic because it is undisputed that the “created”

1 dates tagged onto each letter on the CD are well after the 180-day appeal time limit. (See Doc. #35,
2 Exhs. 7, 11.) Letters that were purportedly written from November 2002 to February 2003 bear tags
3 from September 2004. (Doc. #35, Exh. 7.) According to Defendants, however, the individual
4 documents should have “created” dates that mirror the dates they were purportedly written on (*id.*),
5 because Plaintiff testified at her deposition that she “would type [a letter] up on the computer, save
6 it to the disk, print one out, sign it and put it in an envelope and mail it to Coresource.”⁸ (Doc. #35,
7 Exh. 5 at p. 139.) She testified she would do that each time she wrote another letter. (*Id.* at 200.)
8 The fact that the “created” dates do not match the dates on each letter therefore is contrary to
9 Plaintiff’s assertions. (See Doc. #35, Exh. 9 at p. 63 (testifying that “created” dates cannot be changed
10 on files burned to CD).) Defendants contend that Plaintiff authored these documents after the fact.
11 Thus, Defendants assert that no reasonable juror could determine the letters are authentic.

12 Plaintiff and her expert attempt to explain the mismatching of dates and establish a *prima facie*
13 case of authenticity in several ways. Most of their explanations are insufficient, however, and cannot
14 be relied upon by the court in determining the admissibility of the letters because they are not
15 sufficiently grounded in the facts. See Fed. R. Evid. 702; *Guidroz-Brault v. Mo. Pac. R. Co.*, 254 F.3d
16 825, 830-31 (9th Cir. 2001) (upholding the exclusion of expert testimony based on factually
17 unsupported assumptions). For example, Mr. Victor explains that letters which should bear a creation
18 date of January 2003 may instead be marked as “created” in September 2004 if the computer’s internal
19 calendar and clock were incorrectly set. (Doc. #35, Exh. 9 at p. 78.) Yet there is no testimony or any
20 other form of evidence showing that Plaintiff’s computer calendar and clock malfunctioned. (See Doc.
21 #35, Exh. 9 at pp. 83-87, 97-99, 118-120, 134-35, 142-43; Doc. #35, Exh. 13 at pp. 32, 34.) There
22 are also no facts upon which Mr. Victor could conclude that Plaintiff’s computer was incorrectly set
23 to the same day in September 2004 for almost four months. (See Doc. #35, Exh. 9 at pp. 83-87, 97-99,
24 118-120, 134-35, 142-43.) The court cannot make a finding of admissibility based solely on conjecture
25 and speculation. See Fed. R. Evid. 702; *see, e.g., Guidroz-Brault*, 254 F.3d at 830-31.

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27 ⁸By “disk,” Defendants assume that Plaintiff was referring to a CD, and not the hard drive. (Doc. #35.)
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1 Mr. Victor also tried to explain that computer malware may have somehow changed the creation
2 dates of the documents before they were saved to CD. (Doc. #35, Exh. 11; *but see* Doc. #35, Exh.
3 13 at p. 34.) Yet again, no diagnostic reports have been presented to the court despite the fact that
4 Plaintiff had her computer reformatted several times over. There is no showing of what kind of viruses,
5 worms, or spyware Plaintiff's computer may have had, and there is nothing to show that Mr. Victor had
6 any real information beyond Plaintiff's own vague descriptions to substantiate his opinions.⁹ (Doc. #35,
7 Exh. 9 at pp. 99, 153, 155, 180-81; Doc. #35, Exh. 13 at pp. 55, 60.) Again, this possible explanation
8 does not provide sufficient information for the court to conclude the letters are authentic and
9 admissible. *See* Fed. R. Evid. 702; *see, e.g., Guidroz-Brault*, 254 F.3d at 830-31.

10 Third, Mr. Victor explained that because a number of people in Plaintiff's household had
11 administrative access to her computer anybody could have manually reset the computer's clock setting,
12 moved files off and back onto the computer, or changed the "created" dates on Plaintiff's documents,
13 and so on. (Doc. #35, Exh. 11.) This attempted form of authentication, along with the rest, have no
14 end in sight. (*See* Doc. #35, Exh. 9 at p. 99.) Plaintiff could provide any number of possibilities to
15 explain the hard facts when their likelihood is based on further speculation. Of course, experts may
16 give opinions that are not based on firsthand knowledge, Fed. R. Evid. 703; *Daubert v. Merrell Dow*
17 *Pharm., Inc.*, 509 U.S. 579, 592 (1993), but this goes too far, *e.g., Guidroz-Brault*, 254 F.3d at 830-31
18 (upholding the exclusion of an expert's testimony that was "not sufficiently founded on the facts").
19 Most of Mr. Victor's report is only based on a very superficial investigation. A reasonable jury could
20 not make a finding of authenticity from any of these explanations because there is no underlying

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22 ⁹For example, at one point in his deposition, Mr. Victor recalls that Plaintiff told him that boxes kept
23 popping up on her computer. (Doc. #35, Exh. 9 at p. 180.) This bit of information allowed Mr. Victor to
24 "conclude that the computer she rented was severely infected with spyware and computer viruses." (*Id.*)
25 However, Mr. Victor did not attempt to determine what kind of "boxes" these were (*id.* at 180-81), or whether
26 these boxes were in fact a sign of malware (*see id.* at 183-84). Plaintiff also told Mr. Victor that her computer
27 would mysteriously shut down on its own, but Mr. Victor did not try to determine the cause. (*Id.* at 181, 183-84.)
28 Instead, he admitted that the computer may have unexpectedly shut down due to automatic settings as opposed
to malicious programs. (*Id.* at 183-84.)

evidence to support them. Fed. R. Evid. 702; *Villegas-Valenzuela v. I.N.S.*, 103 F.3d 805, 812 (9th Cir. 1996) (refusing to entertain questions of authentication based on pure speculation).

The last explanation proffered by Mr. Victor is the only possibility presented to the court that has some factual basis. It involves a complicated series of transactions, *see supra* n.7, which if they occurred, would have changed the “created” dates tagged onto the files saved on the CD, (Doc. #35, Exh. 11 (Figs. 1.1-1.3); *but see* Doc. #35, Exh. 13 at p. 57). This explanation, however, is dependent on the use of several CDs (Doc. #35, Exh. 9 at pp. 73, 160), and would necessarily mean that the CD in question is not the original CD to which Plaintiff burned her appeal letters. (See Doc. #35, Exh. 11 (Figs. 1.1-1.3); Doc. #35, Exh. 13 at pp. 16, 27-28.) Indeed, Plaintiff asserted that was the case in her opposition (Doc. #45), and in a supplemental response to a request for production (Doc. #52, Exh. 19). Nevertheless, Defendants maintain that Mr. Victor’s explanation is untenable because the CD that was analyzed by both experts was in fact the original. (Doc. #35, Exh. 6 (fourth request).)

However, given that this part of Mr. Victor’s report is factually grounded in an interview with Plaintiff (Doc. #35, Exh. 11),¹⁰ Fed. R. Evid. 703; *see, e.g., Guidroz-Brault*, 254 F.3d at 830-31, the court finds Plaintiff has met the low threshold for admissibility under Federal Rule of Evidence 901, *see Bazak Int’l Corp. v. Tarrant Apparel Group*, 378 F. Supp. 2d 377, 391 (S.D.N.Y. 2005). A reasonable juror could find that Plaintiff’s letters are authentic considering the totality of the circumstances, *United States v. Black*, 767 F.2d 1334, 1342 (9th Cir. 1985); *Alexander Dawson, Inc.*, 586 F.2d at 1302, including Mr. Victor’s report, Mr. Victor’s interview with Plaintiff, and the confusion in Plaintiff’s deposition. That is, the court recognizes that portions of Plaintiff’s deposition, when pieced together with her response to requests for production, create the appearance that the CD in question is the original and the letters

¹⁰During the interview, Plaintiff explained the way she maintained her back-up CDs to Mr. Victor. Mr. Victor reported that:

According to Ms. Davison, [after her computer had been reformatted], it was re-set to factor settings. Again, consistent with a wiping. Ms. Davison told me that she would take the information from the CD she had used for back-up storage of the documents, and copy it back onto the hard-drive of the newly repaired computer. Then she would make a new back-up, she would create it from the hard-drive of the newly repaired computer.
(Doc. #35, Exh. 11.)

1 are back-dated as Defendants contend. However, both Plaintiff and counsel evidenced a lack of
2 understanding or familiarity with computers, electronic file storage mediums, and technical jargon
3 throughout her deposition testimony, and apparently, in the responses to requests for production.
4 *United States v. Black*, 767 F.2d at 1342. The court recognizes these weaknesses on both sides, and that
5 Defendants' argument gains much strength from their exploitation.

6 For example, there were references to "disks" in general throughout the deposition. (E.g., Doc.
7 #35, Exh. 5 at pp. 139, 200.) Defendants claim that every single time Plaintiff referred to saving a
8 document to "disk," she meant that she saved directly to CD and never to her hard drive (Doc. #35).
9 That, however, is an assumption on Defendants' part that the court is unwilling to embrace. *See, e.g.,*
10 *In re Exxon Valdez*, 270 F.3d 1215, 1249 (9th Cir. 2001) (refusing to overturn the trial court's admission
11 of evidence even where "the challenge to authenticity was plausible"). The term "disk" is a general
12 one, and it could refer to a floppy, CD, or hard drive. (Doc. #35, Exh. 9 at pp. 70-71.) In fact, the
13 parties were alluding to a floppy disk for a significant amount of time before it was finally clarified that
14 the electronic file storage medium was actually a CD. (Doc. #35, Exh. 5 at p. 134.) Moreover, both
15 experts agreed that Plaintiff could not have burned documents to a CD directly through her word
16 program without additional software (Doc. #35, Exh. 9 at p. 196; Doc. #35, Exh. 13 at p. 51), yet there
17 is no indication that Plaintiff possessed such software (*see* Doc. #35, Exh. 9 at p. 196). There is no
18 indication that Plaintiff, her counsel, and even counsel for the opposition were aware that she was
19 testifying inaccurately.

20 In exercising its discretion, the court is also conscious of the circumstances surrounding the
21 discovery of the CD and Defendants' Motion. *Alexander Dawson, Inc.*, 586 F.2d at 1302. This motion
22 for evidentiary ruling only arose after the experts viewed the CD, and the experts analyzed the CD only
23 after Plaintiff had already been deposed. No party, including Plaintiff's own attorneys (e.g., Doc. #35,
24 Exh. 5 at p. 134; Doc. #35, Exh. 6; Doc. #52, Exh. 19), seemed to know or appreciate how important
25 it was to use specific terms and ask specific questions concerning the maintenance of Plaintiff's back-up
26 CDs. Indeed, there were no real questions on that topic during her deposition, and Mr. Mudgett's
27 report was based solely off of Plaintiff's deposition testimony.

